MANDATORY COUNTRY OF ORIGIN LABELING—FINAL RULE

For Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng and Macadamia Nuts

Background

The 2002 and 2008 Farm Bills amended the Agricultural Marketing Act of 1946 to require retailers to notify their customers of the country of origin of muscle cuts and ground beef (including veal), lamb, pork, chicken, and goat meat; wild and farm-raised fish and shellfish; perishable agricultural commodities; peanuts; pecans; ginseng; and macadamia nuts. On October 5, 2004, AMS published an interim final rule for fish and shellfish (69 FR 59708) that went into effect on April 5, 2005. Legislation delayed the implementation of mandatory country of origin labeling (COOL) for all covered commodities except wild and farm-raised fish and shellfish until September 30, 2008. On August 1, 2008, AMS published an interim final rule for the remaining covered commodities (73 FR 45106).

Implementation Timeframe

The final rule amends and incorporates provisions of both 7 CFR Part 60 (fish and shellfish) and 7 CFR Part 65 (all remaining covered commodities) and will become effective 60 days from the date of publication in the Federal Register.

Next Steps

USDA's Agricultural Marketing Service (AMS) will continue a period of informed compliance for this regulation by conducting an active industry education and outreach program concerning the provisions of the Final Rule through March 2009.

Cooperative Agreements are in place with 42 States with enforcement infrastructure to assist with retail surveillance reviews. AMS will conduct in-depth training for the State Cooperators who perform the retail reviews in March 2009. Retail surveillance reviews will begin by April 2009. For those states not entering into a cooperative agreement, AMS will conduct the retail reviews.

AMS will begin audits of firms that supply retailers with covered commodities in July 2009.

Current information on COOL and the final rule can be found on the AMS website at: www.ams.usda.gov/cool. Interested parties can sign up for the AMS listserv function to receive up-to-the minute notification of new information concerning COOL on the website by following the instructions contained on the AMS COOL website.

Ouestions about any aspect of COOL can be submitted to: COOL@usda.gov

Media inquiries should be directed to Billy Cox, AMS Public Affairs, at <u>billy.cox@ams.usda.gov</u> or 202/720-8998.

Industry and consumer questions concerning COOL can also be directed to 202/720-4486.

Major Points and Considerations of the Technical Requirements

The final rule sets forth requirements for all covered commodities. Major points and considerations of the technical requirements of the final rule include definitions, the requirements for consumer notification and product labeling, and the recordkeeping responsibilities of both retailers and suppliers for covered commodities.

Retailer - Only firms licensed as a retailer under the Perishable Agricultural Commodities Act of 1930 are subject to the law and are required to label covered commodities for country of origin and method of production. Under PACA, a retailer is any person engaged in the business of selling any perishable agricultural commodity at retail. Retailers are required to be licensed when the invoice cost of all purchases of perishable agricultural commodities exceeds \$230,000 during a calendar year. The term perishable agricultural commodity means fresh and frozen fruits and vegetables. There are approximately 4,000 PACA licensees that operate about 37,000 retail stores. This definition excludes butcher shops, fish markets, and exporters.

Food Service Establishment - Salad bars and delis located within retail establishments that provide ready-to-eat foods are exempt from the law. Food service establishments are exempted by the statute.

Covered Commodities - Covered commodities included in this rulemaking are muscle cuts of beef (including veal), lamb, chicken, goat, and pork; ground beef, ground lamb, ground chicken, ground goat, and ground pork; wild and farm-raised fish and shellfish; perishable agricultural commodities (fresh and frozen fruits and vegetables); peanuts; pecans; ginseng; and macadamia nuts.

Processed Food Item - Processed food items are exempted from labeling by the statute.

Processed food item means:

a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce), except that the addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the product for consumption, would not in itself result in a processed food item. Specific processing that results in a change in the character of the covered commodity includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding).

Examples related to this exemption would be fish sticks, surimi, mussels in tomato sauce, seafood medley, coconut shrimp, soups, stews, and chowders, sauces, pates, smoked salmon, marinated fish fillets, canned tuna, canned sardines, canned salmon, crab salad, shrimp cocktail, gefilte fish, sushi, breaded shrimp, breaded chicken tenders, teriyaki flavored pork loin, roasted peanuts, and fruit medley.

U.S. Origin –Perishable agricultural commodities, pecans, ginseng, peanuts, and macadamia nuts must be produced (harvested) in the United States; beef, lamb, pork, chicken, and goat must be derived exclusively from animals:

- (1) born, raised, and slaughtered in the United States (including animals born and raised in Alaska and Hawaii and transported for a period of time not more than 60 days through Canada to the United States and slaughtered in the United States); or
- (2) present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States.

Farm-raised fish and shellfish must be hatched, raised, harvested, and processed in the United States and that has not undergone substantial transformation (as established by U.S. Customs and Border Protection) outside the United States; and wild fish and shellfish must be harvested in the waters of the United States or by a U.S. flagged vessel and processed in the United States or aboard a U.S. flagged vessel, and that has not undergone a substantial transformation (as established by U.S. Customs and Border Protection) outside of the United States.

Remotely Purchased Products (e.g., Internet sales) - Retailer may provide country of origin information on the sales vehicle (e.g., Internet site) or at the time the product is delivered to the consumer.

Retail Notification to the Consumer - The label must be in a conspicuous location and legible to allow consumers to identify the country(ies) of origin. Retailers may commingle covered commodities from more than one country of origin provided all possible origins are listed.

Abbreviations – In general, country abbreviations are not acceptable. Only those abbreviations approved for use under Customs and Border Protection rules, regulations, and policies, such as "U.K." for "The United Kingdom of Great Britain and Northern Ireland", "Luxemb" for Luxembourg, and "U.S. or USA" for the "United States of America" are acceptable.

State and Regional Labeling Programs - These marketing programs (e.g., "California Grown", "Go Texan") are not affected by this rule. For domestic and imported perishable agricultural commodities, macadamia nuts, peanuts, pecans, and ginseng, State, regional, or locality label designations are acceptable in lieu of country of origin labeling. State-level country of origin labeling programs that encompass commodities that are governed by this regulation are preempted.

Recordkeeping - In general, retailers must maintain records or other documentary evidence that permits verification of origin claims made at retail. These records may be maintained in any location and, unless specified otherwise, must be maintained for a period of 1 year from the date the declaration was made at retail. Upon request, these records must be provided to any duly authorized representatives of USDA within 5 business days of the request.

Retail suppliers must maintain records to establish and identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity for a period of 1 year from the date of the transaction. Upon request, these records must be provided to any duly authorized representatives of USDA within 5 business days of the request and may be maintained in any location.

The supplier of a covered commodity that is responsible for initiating a country of origin declaration, which in the case of beef, lamb, pork, chicken, and goat is the slaughter facility, must possess records that are necessary to substantiate that claim. A producer affidavit shall be considered acceptable evidence to initiate the origin claim, provided it is made by someone having first-hand knowledge of the origin of the covered commodity and identifies the covered commodity unique to the transaction.

In addition, packers that slaughter animals that are tagged with an Animal and Plant Health Inspection Service, 840 National Animal Identification Number device without the presence of any additional accompanying marking (i.e., "CAN" or "M") may use that information as a basis for a U.S. origin claim. Packers that slaughter animals that are part of another country's recognized official system (e.g. Canadian official system, Mexico official system) may also rely on the presence of an official ear tag or other approved device on which to base their origin claims.

In the case of cattle, producer affidavits may be based on a visual inspection of the animal to verify its origin. If no markings (i.e., "CAN" or "M" brands) are found that would indicate that the animal is of foreign origin, the animal may be considered to be of U.S. origin.

For an imported covered commodity, the importer of record as determined by CBP, must ensure that records: provide clear product tracking from the United States port of entry to the immediate subsequent recipient and accurately reflect the country(ies) of origin of the item as identified in relevant CBP entry documents and information systems; and maintain such records for a period of 1 year from the date of the transaction.

Summary of Changes from the Interim Final Rules

The final rule incorporates changes from the October 5, 2004 interim final rule for fish and shellfish and the August 1, 2008 interim final rule for the remaining covered commodities based on comments received in response to the relevant prior requests for comments associated with this rulemaking and the Agency's responses to these comments.

Definitions

Definition for "Commingled Covered Fish and Shellfish Commodities" - In the regulatory text for fish and shellfish (7 CFR part 60), a definition for "commingled covered commodities" has been added for clarity and to conform to the regulatory text for the other covered commodities.

Definition of "Ground Beef" - Under the final rule, the term "ground beef" has the meaning given that term in 9 CFR §319.15(a), i.e., "chopped fresh and/or frozen beef with or without seasoning and without the addition of beef fat as such, and containing no more than 30 percent fat, and containing no added water, phosphates, binders, or extenders." The definition of ground beef also includes products defined by the term "hamburger" in 9 CFR §319.15(b).

Definition of "Lamb" - The definition of "lamb" has been modified in response to comments to include mutton. Under the final rule, the term "lamb" means meat produced from sheep.

Definition of "NAIS-Compliant System" - In 7 CFR part 65, the definition of "NAIS-compliant system" has been deleted in response to comments received as it is no longer needed.

Definition of "Pre-Labeled" - A definition of "pre-labeled" has been added to both 7 CFR part 60 and 7 CFR part 65 for clarity in response to comments received. Under the final rule, the term "pre-labeled" means a covered commodity that has the commodity's country of origin, and, as applicable, method of production information, and the name and place of business of the manufacturer, packer, or distributor on the covered commodity itself, on the package in which it is sold to the consumer, or on the master shipping

container. The place of business information must include at a minimum the city and state or other acceptable locale designation.

Definition of "Produced" - In 7 CFR part 65, the definition of "produced" has been modified for clarity in response to comments. Under the final rule, the term "produced" in the case of perishable agricultural commodities, peanuts, ginseng, pecans, and macadamia nuts means harvested.

Notification Provisions

Labeling Covered Commodities of United States Origin - The August 1, 2008, interim final rule contained an express provision allowing U.S. origin covered commodities to be further processed or handled in a foreign country and retain their U.S. origin. This provision has been deleted. To the extent that it is allowed under existing Customs and Border Protection (CBP) and Food Safety and Inspection Service (FSIS) regulations, U.S. origin covered commodities may still be eligible to bear a U.S. origin declaration if they are processed in another country such that a substantial transformation (as determined by CBP) does not occur. In addition, to the extent that additional information about the production steps that occurred in the U.S. is permitted under existing Federal regulations (e.g., CBP, FSIS), nothing in the final rule precludes such information from being included.

Labeling Imported Covered Commodities (Including Fish and Shellfish) - Imported covered commodities for which origin has already been established as defined by this law (e.g., born, raised, slaughtered or grown) and for which no production steps or substantial transformation have occurred in the United States, shall retain their origin, as declared to U.S. Customs and Border Protection at the time the product entered the United States, through retail sale. Imported fish and shellfish covered commodities that have been substantially transformed (as established by U.S. Customs and Border Protection) in the United States or aboard a United States flagged vessel, such product shall be labeled at retail as "From Country X, processed in the United States" or "Product of Country X and the United States".

Country of Origin Notification for Muscle Cuts - Under the August 1, 2008, interim final rule, if an animal was born, raised, and/or slaughtered in the United States and was not imported for immediate slaughter as defined in §65.180, the origin of the resulting meat products derived from that animal could have been designated as "Product of the United States, Country X, and/or (as applicable) Country Y", where Country X and Country Y represent the actual or possible countries of foreign origin.

The Agency received extensive feedback from livestock producers, members of Congress, and other interested parties expressing concern about the provision in the interim final rule that allowed U.S. origin product to be labeled with a mixed origin label. It was never the intent of the Agency for the majority of product eligible to bear a U.S. origin declaration to bear a multiple origin designation. The Agency made additional modifications for clarity.

Multiple Countries of Origin - Under the final rule, for muscle cut covered commodities derived from animals that were born in Country X or (as applicable) Country Y, raised and slaughtered in the United States, and were not derived from animals imported for immediate slaughter as defined in §65.180, the origin may be designated as "Product of the U.S., Country X, and (as applicable) Country Y".

Commingled During a Production Day - For muscle cut covered commodities derived from animals born, raised, and slaughtered in the U.S. that are commingled during a production day with muscle cut covered commodities derived from animals that were raised and slaughtered in the United States, and were not

derived from animals imported for immediate slaughter as defined in §65.180, the origin may be designated, for example, as "Product of the United States, Country X, and (as applicable) Country Y".

For muscle cut covered commodities derived from animals that are born in Country X or Country Y, raised and slaughtered in the United States, that are commingled during a production day with muscle cut covered commodities that are derived from animals that are imported into the United States for immediate slaughter as defined in §65.180, the origin may be designated as "Product of the United States, Country X, and (as applicable) Country Y".

Countries of Origin Listed in Any Order - In all of the cases above, the countries of origin may be listed in any order. In addition, if animals are raised in another country and the United States, provided the animals are not imported for immediate slaughter as defined in §65.180, the raising that occurs in the United States takes precedence over the minimal raising that occurred in the animal's country of birth.

Labeling Ground Beef, Ground Pork, Ground Lamb, Ground Goat, and Ground Chicken. - The declaration for ground beef, ground pork, ground lamb, ground goat, and ground chicken covered commodities shall list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin.

Several commenters requested that the Agency reconfirm the appropriateness of this 60-day time-frame. The Agency believes the COOL program should be implemented in the least burdensome manner possible while still achieving the objective that consumers be provided with accurate country of origin information on covered commodities for the purposes of making purchasing decisions. The 60-day in inventory allowance speaks only to when countries may no longer be listed. The 60-day inventory allowance establishes a standard for the Agency's enforcement purposes regarding when the Agency would deem ground meat products as no longer accurately labeled. The Agency determined that in the ground beef industry a common practice is to purchase lean beef trimmings from foreign countries and mix those with domestic beef trimmings before grinding into a final product. Retailers seldom purchase those imported beef trimmings with any particular regard to the foreign country, but rather, they make purchases based on the cost of the trimmings due to currency exchange rates and product availability. Over time, the imported beef trimmings being utilized in the manufacture of ground beef can and does change between various foreign countries. The Agency determined that it was reasonable to allow the industry to utilize labels representing that mix of countries that were commonly coming through their inventory during what was determined to be a 60-day product inventory and on order supply.

Markings

Abbreviations - Under the October 5, 2004, interim final rule for fish and shellfish and the August 1, 2008, interim final rule for the remaining covered commodities, only those abbreviations approved for use under CBP rules, regulations, and policies were acceptable. The 2008 Farm Bill and the August 1, 2008, interim final rule expressly authorized the use of State, regional, or locality label designations in lieu of country of origin for perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts. In response to comments received, under this final rule, abbreviations may be used for state, regional, or locality label designations for these commodities whether domestically harvested or imported using official United States Postal Service abbreviations or other abbreviations approved by CBP.

Recordkeeping

The 2008 Farm Bill made changes to the recordkeeping provisions of the Act such that records maintained in the course of the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits, may serve as such verification. The Secretary is prohibited from requiring the maintenance of additional records other than those maintained in the normal conduct of business. This final rule makes further changes in response to comments received to reduce the recordkeeping burden.

Within 5 Business Days at Any Location - For retailers, the rule requires records and other documentary evidence relied upon at the point of sale by the retailer to establish a covered commodity's country(ies) of origin and method of production (wild and/or farm-raised), as applicable, to be either maintained at the retail facility or at another location for as long as the product is on hand and provided to any duly authorized representative of USDA, upon request, within 5 business days of the request. The records may be kept in any location.

Pre-Labeled Products - For pre-labeled products, the label itself is sufficient information on which the retailer may rely to establish the product's origin and method of production, as applicable, and no additional records documenting origin and method of production information are necessary. Under the August 1, 2008, interim final rule, retailers were required to maintain these records for a period of 1 year.

Producer Affidavits - Under the final rule, producer affidavits shall also be considered acceptable records that suppliers may utilize to initiate origin claims for all covered commodities, provided it is made by someone having first-hand knowledge of the origin of the covered commodity and identifies the covered commodity unique to the transaction.

Responsibilities of Retailers and Suppliers - With regard to the "safe harbor" language that was contained in the October 30, 2003, proposed rule and the October 5, 2004, interim final rule, which allowed retailers and suppliers to rely on the information provided unless they could have been reasonably expected to have knowledge otherwise, based on comments received, similar "safe harbor" language has been included in this final rule.

NAIS-Compliant Systems - With regard to the recordkeeping provision concerning livestock that are part of a NAIS-compliant system, in response to comments received, the Agency has clarified that packers who slaughter animals that are tagged with an 840 Animal Identification Number device without the presence of any additional accompanying marking indicating the origin as being a country other than the U.S. (i.e., "CAN" or "M") may use that information as a basis for a U.S. origin claim. In addition, packers that slaughter animals that are part of another country's recognized official system (e.g. Canadian official system, Mexico official system) may also rely on the presence of an official ear tag or other approved device on which to base their origin claims.

Visual Inspection - In the case of cattle, producer affidavits may be based on a visual inspection of the animal to verify its origin. If no markings are found that would indicate that the animal is of foreign origin (i.e., "CAN" or "M"), the animal may be considered to be of U.S. origin.

Major Points and Considerations of Cost Estimates

Recordkeeping Burden

The interim final rule published on August 1, 2008, estimated the recordkeeping burden at \$126 million in first year for development and operation; \$499 million in subsequent years for maintenance and operation.

Under the final rule, the recordkeeping burden for the first year is estimated at \$135 million for development and operation and \$506 million for maintenance and operation. Thus, the total recordkeeping cost for all participants in the supply chain for covered commodities is estimated at \$641 million for the first year, with subsequent maintenance costs of \$506 million per year.

The reason for the increases in recordkeeping burden estimates is the addition of the wild and farm-raised fish and shellfish covered commodities, which previously were included under a separate interim final rule published on October 5, 2004.

Economic Impacts

The direct cost to retailers and their suppliers include the recordkeeping burden plus capital, labor, and other related costs to manage product flow at the producer, intermediary, and retailer levels.

Benefits: The expected benefits from implementation of this rule remain difficult to quantify. The Agency's conclusion remains unchanged, which is that the economic benefits will be small and will accrue mainly to those consumers who desire country of origin information. Commenters provided no additional substantive evidence to alter the Agency's conclusion that the measurable economic benefits of mandatory COOL will be small. Additional information and studies cited by commenters were of the same type identified in the 2008 interim final rule—namely, consumer surveys and willingness-to-pay studies, including the most recent studies reviewed for final regulatory impact analysis.

Direct Costs: In the 2008 interim final rule, first-year implementation costs for directly impacted firms were estimated at \$2,517 million.

The first-year implementation costs for directly affected firms are now estimated at \$2,629 million. The increase in estimated costs is attributable to the addition of wild and farm-raised fish and shellfish to the list of covered commodities.

Costs per firm are estimated at \$370 for producers, \$48,219 for intermediaries and \$254,685 for retailers. The new costs estimates per firm for producers and intermediaries are lower than the 2008 interim final rule estimates due to lower estimated costs per unit resulting from the addition of firms handling fish and shellfish, which have lower costs compared the average for other covered commodities. Conversely, costs for retailers are higher due to the addition of fish and shellfish covered commodities to the analysis.

Economy Costs: The estimated cost to the U.S. economy in higher food prices and reduced food production in the tenth year after implementation of the final rule is \$211.9 million.

Under the earlier 2008 interim final rule, these costs also were estimated at \$211.9 million.

The reason that the economy-wide costs are unchanged even with the addition of fish and shellfish covered commodities is that these commodities were included in this portion of the regulatory impact analysis in both

the interim final rule and this final rule. Due to the nature of the economic model used to generate these estimates, the impacts of the fish and shellfish covered commodities were included in the model even though fish and shellfish were not covered by the 2008 interim final rule.